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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO.

FLORENCE PRINTING COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CHARLESTON TYPOGRAPHICAL UNION NO. 43,
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the petitioner respectfully shows to this Court:

THE OPINION AND ORDER OF THE COURT AND ADMINISTRATIVE AGENCY BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is printed in the appendix to this Petition but has not yet appeared in the Federal Reporter.

This case came to that Court on appeal from a decision and order of the National Labor Relations Board. The said decision and order of the Board is reported as 158 NLRB No. 1, and is printed in the record which has been filed with this Court.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which the petitioner now asks this Court to review, is dated March 21, 1967, and was entered by the Court on that date.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of certiorari, is conferred upon this Court by the provisions of 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1. Is the National Labor Relations Board authorized to require that an employer shall pay full and unmitigated back wages to its striker-employees regardless of undisputed evidence which shows that such employees have not sought interim employment in mitigation of damages?

2. In order to make a *prima facie* showing that reinstated employees have not fulfilled their lawful obligation to mitigate their damages, is an employer bound to prove by direct evidence that each employee personally received, and unjustifiably rejected, an offer of an interim job equivalent to the one which he had held with the employer?

3. Where it is conceded that employees did not accept interim employment on account of their continuing obligation to engage in strike activities in behalf of their union, does the National Labor Relations Board have the authority to require that their employer shall pay them full back wages as though they have discharged their duty to seek interim employment in mitigation of damages?

STATUTE INVOLVED IN THE CASE

The following section of the National Labor Relations Act is involved here:

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . ." (provisos omitted from this section).

National Labor Relations Act,
29 U.S.C. §160(c)

STATEMENT OF THE CASE

On September 5, 1962, thirteen of the petitioner's employees struck for recognition by the petitioner[1] of Charleston Typographical Union No. 43[2] as their bargaining agent without an election as is provided for in the National Labor Relations Act (3).[3] On November 21, 1963, the National Labor Relations Board ruled this to have been an unfair

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[1]Hereinafter sometimes referred to as the "Company."

[2]Hereinafter referred to as the "Union."

[3]Unless otherwise indicated, all page references are to the printed joint appendix filed in the Court of Appeals and now included in the record filed with this Court.

labor practice strike and ordered reinstatement of strikers with back wages payable by the petitioner from such time as the Union offered to return them to work until they were reinstated by the Company. *Florence Printing Company*, 145 NLRB 141 (1963). Following that, on July 7, 1963, the Union offered to return the strikers to their jobs (3).

On petition of the Board, the Court of Appeals for the Fourth Circuit issued its decree granting enforcement of the Board's order. *National Labor Relations Board v. Florence Printing Company*, 333 F. 2d 289 (4 Cir. 1964). The effective date of the Court's decree was June 10, 1964. The petitioner promptly complied with all phases of the Board's order and the Court's decree, except for settlement of the amount of back wages due to striking employees.[1] The period of liability of the petitioner for back wages was from July 7, 1963 until June 30, 1964 when they were offered reinstatement (3-4). When it developed that, for this entire period, eight of the strikers contended that they had no interim earnings whatever and claimed no expenses incurred in seeking interim employment (4-8), and that the remaining five had reported only trivial earnings,[2] the parties were unable to agree on the amount of back wages due the strikers. A backpay specification was issued and a hearing was ordered to be held for the purpose of resolving these issues (61-81).

The Board's compliance division and its General Counsel insisted that the petitioner was legally bound to pay strikers

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[1]One of the strikers, Romelous E. Bass, was not reinstated because he severely assaulted a company supervisor during the strike. The Board sustained the Company's contention that Bass should be disqualified on account of such assault (141-143).

[2]Ranging from $39.00 in the case of Hanna (5) to $572.00 in the case of Schuyler (6-7).

full back wages as if it made no difference whether they sought interim employment in mitigation of damages, and as if it was immaterial that they had in fact rejected interim job offers unless the petitioner was able to prove that they had done so. More specifically, it was their position that, whatever the true facts may be, the petitioner was responsible for paying full back wages unless it could show by direct evidence as to each striker that he or she had received a personal offer of a job equivalent to that held with the petitioner and had rejected such offer without any justification for having done so.[1] These Board agencies steadfastly held to that position even in instances where their own investigation revealed direct proof that strikers had in fact rejected such personal offers of employment in equivalent jobs.

Of course these theories were not stated in so many words, but the fact that the Board was relying upon them was manifested again and again throughout the proceeding. And, as the record shows, the Board unreservedly shared the Union's openly-announced view that the Union had every right, in connection with its payment of large benefits to strikers, to require that strikers engage in no interim employment which would materially interfere with their continuing strike duties and that, by acquiescence in such requirement, the striker should suffer no reduction in their back wage claims.

In his deliberations, the trial examiner for the Board ignored the direct and circumstantial evidence which clearly showed that strikers had not sought interim employment. He also disregarded evidence that three of the strikers had per-

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[1]Except for such actual earnings as admittedly were received by the five employees referred to above.

sonally been offered suitable interim jobs, but had unjustifiably rejected such offers.

Except for his disqualification of Bass, the trial examiner confined his consideration of back wage issues to a technical analysis of the nature of strike benefits and the establishment of a burden of proof consistent with the position which General Counsel had taken.[1] He held that strike benefits were in the nature of "insurance" and therefore not "earnings," without ever considering the question of whether the employees were induced by such strike benefits to refrain from seeking interim employment (99-108). As to the burden of proof, he held that because the petitioner had not proven that each *"given"* employee had been personally offered equivalent work by other employers during the liability period, the petitioner had ". . . failed to meet the burden of proof required of it. . . ." (137-139).

On appeal, the full Board fully sustained the trial examiner's ruling with respect to backpay issues (141-144).

The Court of Appeals gained jurisdiction over the proceeding by virtue of a petition for review which was filed by the Company pursuant to the provisions of Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f). The court panel which considered the case divided over the issues. The majority of the panel approved the Board's rulings and refused to grant the petitioner any relief from the Board's order. Judge Boreman dissented on the ground that the petitioner had made a *prima facie* showing of lack of due diligence on the part of the strikers to minimize their losses (Appendix,[2] pp. 15a-21a).

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[1]In addition, the examiner did excuse Glenn A. Johnson for rejecting a job offer at Rock Hill, South Carolina. As will be seen, this was not material to the real issues in the case (135-136).

[2]The appendix to this Petition.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. There is a rapidly growing conflict among the courts of appeal upon the question involved here of whether reinstated employees are entitled to full back wages without ever being called as witnesses to rebut circumstantial proof, and necessary inferences, that they have not diligently sought to mitigate their losses.

2. If this important question is not settled by this Court, such conflict will proliferate into the future, both uncertainty and further conflicts among the Federal courts.

ARGUMENT AMPLIFYING WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

In supplemental proceedings such as this, the purpose of which is to establish the amount of back wages due employees under a Board order, it is obvious, of course, that the employees and the Board's investigating division have a virtual monopoly over the direct evidence relating to the issue of whether the employees have diligently sought interim employment in an effort to mitigate losses. The question therefore arises as to the propriety of the Board's aligning itself with such employees as a partisan advocate of their cause and, with full knowledge that they have not sought to mitigate their losses, utilizing Board processes to collect full backpay for them, with the result that the employees are made more than whole. Should not the Board be required to see that all of the relevant evidence is brought out into the open in an effort to assure that the parties' rights and obligations shall be established upon the basis of the true facts, or should the Board be free to impose upon the employer a "burden of proof" which has the effect of concealing such true facts and rewarding strikers for will-

fully incurring wage losses? It seems to the petitioner that this Court has fully answered these questions.

> "[The Board] 'acts in a public capacity to give effect to the declared public policy of the Act . . .' "
>
> *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, 193, 61 S. Ct. 845, 852, 85 L. ed. 1271, 1282 (1941)

The petitioner submits that an appraisal of the Board's handling of this case will lead inevitably to the conclusion that the result here has been brought about by the Board's improper assumption of the role of a private advocate.

The case involves employees whose talents and wages vary widely, ranging from apprentices or trainees earning the minimum wage of $1.25 per hour to journeymen printers earning $2.40 per hour (61-69, 137). At the hearing before the Board, the petitioner established that there was a heavy demand for labor in the local area throughout the liability period. Numerous jobs at various kinds of work were advertised daily in petitioner's newspaper, which was in general circulation in the area (19-21). These jobs offered starting wages which ranged higher than the wages which had been received by many of the strikers for their work at petitioner's place of business.

Jobs for journeymen printers also were available at The Herald Publishing Company in nearby Dillon, South Carolina at wages equal to those which the petitioner had paid its striking journeymen printers (29-32, 53-54, 151-153). Four such journeymen worked part time at that company and, therefore, were well aware of the availability of jobs on a full-time basis. But they carefully restricted their work

to no more than one shift per week—a restriction calculated to avoid forfeiture of their strike pay.[1] In connection with his limited disqualification of Bass for backpay, the trial examiner found that this work was suitable for journeymen printers and that the distance of twenty-eight miles to Dillon was no excuse for refusing to accept it (128-134). Yet, none of these four ever asked for full-time work in these jobs (35).

There were other printing establishments in the area but there was no evidence that any of the strikers ever applied for work there (40, 50). Johnson admitted under oath that he had not done so[2] (40). He also admitted that he had not sought any other work, and insofar as he knew as spokesman for all the strikers, that none of them had either (40-41).

Moreover, when registering with the Employment Security Commission, a necessary prerequisite to eligibility for unemployment pay, the strikers specifically restricted their pretended availability for work to jobs of the same type they had held with the petitioner (41). And, at the same time, they were taking the position that no such similar work was available (59-60). This necessarily meant, of course, that they were not seeking employment.

In addition to all of the foregoing, there was evidence that Bass, Glenn A. Johnson, Windham and Schuyler were personally and individually solicited to accept full-time work by The Herald Publishing Company and that they rejected such job offers. In his pre-hearing affidavit, Bass admitted

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[1]This phase of the case will be more fully discussed later.

[2]This was in an Employment Security Commission hearing where Johnson was speaking for all of the strikers in an effort to qualify them for unemployment pay (38-41).

that "In Oct. 1963 the Herald offered me a full time job ...." and that "I was not the only one of the strikers offered jobs.... The Dillon Herald offered Glenn [Johnson], Norris Windham, Eddie Schuyler and myself jobs that I know of" (152-153). This affidavit was credited by the trial examiner and accepted as "evidence of record" (131-132).

Apart from that, and Bass' repeated adoption and ratification of his affidavit from the witness stand (43-47), Bass admitted in his testimony at the hearing that such offers were in fact made to all four of these named strikers (46). He sought to offset this testimony and his affidavit with his patently absurd, and self-contradicting, claim that these offers were made, or were to be effective, after the strike was over (46). The trial examiner discredited this contradiction and partially disqualified Bass, but never mentioned that Johnson, Schuyler and Windham were included in the evidence which disqualified Bass (129-132). As to this same incident, Johnson's testimony was as follows:

"Q. During the time that you were working there at The Herald Publishing Company, was Mr. Jackson there that entire time? A. Yes, he had been there the whole time, yes.

* * *

"Q. . . . During the period that you were working down there, did you ever have any conversations with Mr. Jackson on the subject of a full time job for yourself at The Herald Publishing Company? A. No sir. *The only thing ever mentioned about a full time job is that during the conversations from day to day we were talking and he brought up one time about the four operators that we had going over there.*

"Q. Now, who were these four? A. Myself, R. E. Bass, Eddie Schuyler and Norris Windham" (54) (emphasis supplied).

This evidence poses the most obvious and glaring question of why, in this one-year period, eight of these strikers earned nothing, and the other five so little, while none of them claimed any expense incurred in seeking employment.[1] The answer to this is equally as obvious and glaring. The Union induced—indeed it ordered—strikers not to accept interim work. Not only that, the Union, with Board approval, freely and openly asserts that it had a right to, and did, require that strikers should continue to serve the Union's strike cause, thereby eliminating any possibility of their mitigation of damages and, at the same time, asserted that the Board could require the petitioner to pay them while they were striking for the Union.

Union payments to employees, in effect during the strike, were continued throughout the liability period. In five of the thirteen cases, such strike pay exceeded the full amount of wages that the strikers would have earned had they been working for the petitioner. Such pay for the remaining eight ranged up from 72% to 100% of such wages (100-103). The right of employees to receive these payments was subject to several conditions. They were required to report to the picket line daily (105), and they were also required to walk the picket line each day unless they were excused from doing so (55, 60, 152). If any striker had worked at interim employment for more than one regular shift in any work-

[1]The only expenses claimed were those incurred by the four who engaged in part-time work at the Herald Publishing Company and this was only for expenses incurred traveling to and from those jobs (81).

week, he would have been penalized to the extent of 25% of his strike pay for each such additional shift (105). The few strikers who did supplement their strike pay by part-time work at The Herald Publishing Company never worked over this limitation and, therefore, incurred no forfeiture in strike pay.[1] Each of them averaged well under ten shifts during each of the three-month quarters in which they engaged in this part-time work and their work throughout the part of the year 1964 was negligible[2] (80).

The General Counsel called Glenn A. Johnson as a witness but made no attempt to explain why he failed to seek or refused to accept any of the available work referred to above[3] (48-54). The Union supplied the answer by eliciting the following testimony from Johnson:

> "Q. (By [union representative] Mr. McFee) Mr. Johnson, *could you have taken a Job?* A. *No sir.* (emphasis supplied)
>
> Q. What was your position with the union? A. My position with the union?
>
> Q. Yes sir. A. Chapel Chairman, are you talking about during the strike?

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[1]The maximum strike pay was $74.40 per week (20). In the 51-week liability period, the maximum amount payable would be $3,814.80. The payments to Johnson, Schuyler and Windham established by stipulation in each case exceeded that figure (102-103).

[2]The part-time earnings reported in Appendix E-1 on page 80 were at the rate of $2.30-$2.40 per hour (30).

[3]Apart from efforts to secure a denial that Johnson had been personally solicited by the Herald Publishing Company (54), General Counsel confined his questions to justifying Johnson's refusal of a job offer at Rock Hill, South Carolina — a factor which will be more fully discussed later (48-54).

Q. During the strike? A. Well, there was two designations, I am Chapel Chairman and during the strike, I was also strike committee chairman" (54-55).

Moreover, when Bass received the offer of a full-time job at the Herald Publishing Company, he responded "that he would talk with the union officials in Charleston . . . [to see] if they would release him." He later reported, ". . . that they would not release him and he could not take the job" (30). When union representative McFee was asked, by a Company representative, why he had refused to let Bass accept this offer, he merely retorted that Bass "was an employee of [the petitioner] whether [the petitioner] liked it or not" (26). Bass' case is no longer in issue, but this surely does not mean that this evidence is irrelevant here—it proves that the Union was directing strikers not to engage in interim employment, and that the strikers were acquiescing in such orders of the Union.

In his affidavit to the Board, Bass specifically stated that he, Johnson, Schuyler and Windham had not accepted the jobs offered in Dillon because "We felt the offers were being made to get us off the picket line" (152). Similarly, as to Johnson, the Union elicited testimony that he received a job offer from a publisher in Rock Hill, when allegedly such job offers usually come through mere foremen (55-56). The purpose of this peculiar testimony was incorporated in the trial examiner's approving notation that "This made Johnson and the Union official suspicious that the offer was induced by Respondent *in order to remove Johnson from his leadership of the strike and to get him out of town*" (136) (emphasis supplied).

In light of revelations in the testimony of Bass and Johnson that they and others had willfully incurred wage losses

it is not surprising that no further employee witnesses were called by the Board's General Counsel or the Union.

The duty of employees with respect to damage mitigation in such cases was settled by this Court in 1941, and has been reiterated and explained in numerous cases since that time.

"Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."

Phelps Dodge Corporation v. National Labor Relations Board, 313 U.S. 177, 197-198, 61 S. Ct. 845, 854, 85 L. ed. 1271, 1285 (1941)

". . . [T]he purpose of a back pay award is to make whole the employee. . . . *Of course, an employee must use reasonable diligence to find employment during the period of discrimination. He is not entitled to back pay for periods during which he voluntarily remained in idleness."* (emphasis supplied)

National Labor Relations Board v. Brown & Root, Inc., 311 F. 2d 447, 452 (8 Cir. 1963)

"We shall . . . set aside the Board's order and remand the case to the Board with direction that it make specific findings of fact with respect to the matter and award to Bramer no more than the difference between what he could have earned by working for respondent . . . and *what he could have earned elsewhere if he had used due diligence to secure other employment."* (emphasis supplied)

National Labor Relations Board v. Pugh & Barr, Inc., 207 F. 2d 409, 410 (4 Cir. 1953)

". . . [T]he usual wage earner, reasonably conscious of the obligation to support himself and family by suitable employment, after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay 'desirable new employment.'"

National Labor Relations Board v. Southern Silk Mills, 242 F. 2d 697, 700 (6 Cir. 1957)

"We cannot accept the Board's conclusion that Fulcher was not obligated to seek and accept agricultural employment. The record discloses that such employment was available. The Board seems to think that Fulcher was bound to accept no work save preaching and work in saw mills. To us that seems quite unreasonable.

. . .

"As to Fulcher, the Board's order is set aside with the direction that the Board deduct from the amount awarded him such an amount as Fulcher could have earned had he used due diligence to seek other suitable employment, including agricultural employment."

National Labor Relations Board v. Moss Planing Mill Co., 224 F. 2d 702, 705, 706 (4 Cir. 1955)

". . . [T]here *were, in the area where* [*the employee*] *resided, at least 18 business establishments, in addition to a highway construction project.* In view of these circumstances . . . we adopt the Trial Examiner's finding as to the inadequacy of Wagner's search for work." (emphasis supplied)

Missouri Transit Company, Inc., 125 NLRB 1316, 1318 (1959)

". . . [T]he fact that Alvarez registered for work with the Texas Employment Commission is no more than a

factor to be given such weight as it may be entitled under all the circumstances of the case and is to be considered as such, along with the circumstance that he applied for work at the union hiring hall, in determining whether Alvarez made a reasonable search for employment.

. . .

". . . [T]hroughout the period in question, there was numerous and constantly recurring openings for unskilled labor in a wide variety of fields of employment in and around Corpus Christi. . . . *Alvarez made no application for work to any private employer. It is our view that a condition precedent to any award of back pay is due diligence on the part of the discharged employee to find other work.*" (emphasis supplied)

American Bottling Co., 116 NLRB 1303, 1307 (1956)

". . . [S]o far as it appears from the record [her work] did not require any high degree of skill. Her rate of pay at the time of her discharge was 55 cents per hour. *She was not justified therefore in limiting her search to work involving the use of any special skill.*" (emphasis supplied)

Seamprufe, Inc., 106 NLRB 1143, 1143-1144 (1953)

In light of these precedents and the evidence recited above, the Board was presented with a number of questions which it should have decided, but never mentioned. Is total idleness throughout a year of plentiful job opportunities not *prima facie* evidence that the strikers had not sought interim employment? If that standing alone was not sufficient, is such an inference not obviously and necessarily raised by the added factor that, during this year, the strikers were

receiving extraordinarily large strike payments which they would have forfeited if they had worked in this interim?

Is the concession that Johnson "could not" accept interim employment on account of his union duties no proof whatever that he did not diligently seek employment or that he was unavailable for any employment?[1] And, when the Union's boldly asserted claim of right to require employees to refrain from work is coupled with its order that Bass was not to accept a job offer and Bass' admission that he and three other strikers rejected job offers to avoid interference with their strike activities, is there neither direct proof that these four refrained from seeking work nor valid circumstantial proof that others had refrained also—all at the behest of the Union?

When it was shown that the strikers restricted their registration with the Employment Security Commission and that Johnson admitted to that agency that he, and in effect his fellow strikers, had not sought interim employment, was some denial, explanation or rebuttal not required before the Board could assume as a matter of law that these strikers sought diligently for work in mitigation of damages? Even if there were less than four full-time jobs available at The Herald Publishing Company,[2] is the conceded fact that Johnson, Schuyler and Windham never asked for such work as was readily available to them not any proof that they failed to discharge their duty to seek work in mitigation of damages? Finally, was Bass' admission that he and those three

---

[1]It was conceded that striker Mathews was not entitled to backpay when he "was unavailable for employment due to illness" (65). The record contains no explanation of how employees who are unavailable for work due to union requirements have rights superior to those who are unavailable due to serious illness.

[2]This factual issue was not resolved by the Board.

had been solicited personally to work for The Herald Publishing Company, coupled with Johnson's equivocation about this subject and the trial examiner's finding that this work was suitable for them, not some proof that they had willfully rejected job offers which were personally made to them?[1]

The trial examiner avoided all of these crucial questions by advancing a new and completely different concept of law applicable in such cases. He dismissed the petitioner's contention by ruling that:

> "No showing was made by Respondent that any of the 'want ad' positions advertised in its newspaper were ever *personally* offered to any of the involved 13 former strikers. . . ." (137) (emphasis supplied).
>
> . . .
>
> "[T]he burden passes to 'the respondent to establish facts which would negative the existence of liability to a *given* employee or which would mitigate that liability.' (citations omitted) Respondent made no attempt at the hearing to show that any of the 'want ad' jobs were offered to any of the involved *given* former strikers. Respondent has accordingly failed to meet the burden of proof required of it. . . ." (138).

This, of course, is but another way of saying that these employees had no obligation whatever to seek any interim employment and totally contradicts this Court's ruling in the *Phelps Dodge* case, as well as the numerous precedents which have been handed down under such ruling.

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[1]The fact that there was contradiction (35) and equivocation (54) in this evidence certainly did not excuse the Board's ignoring it completely. It is the Board's duty to resolve such factual questions.

Moreover, even as to such mitigation as would be available to an employer under this novel ruling, the examiner seeks to impose upon employers a burden of proof which, except in the most extraordinary circumstances, would be impossible to carry. The fact that the petitioner had offered such proof in this case was ignored completely.[1]

The examiner dealt with the strike payments abstractly as if the issue with respect to them would be resolved by technical analyses and dictionary definitions, regardless of whether the employees were induced by such payments to refrain from mitigating damages. Thus, upon the basis of such reasoning, he concluded that these payments were not "earnings" and therefore constituted no defense against unmitigated payment by the petitioner (102-109). These deliberations of the trial examiner merely beg the question: *What difference does it make that strike payments may be, as he says, in the nature of "insurance"* (109), *if the receipt of them induced or enabled the strikers to refrain from discharging their duty to mitigate damages?*

Even if it were to be assumed *arguendo* that these strike payments were from an "insurance" program in the most literal sense, still there is no logical or legal basis for the trial examiner's ruling. His finding that these payments did not amount to "earnings," coupled with his refusal to consider whether such payments thwarted damage mitigation, necessarily means that, *as a matter of law,* employees are completely free to insure themselves against any need for

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[1]The examiner added that the "want ad positions here offered as a defense in mitigation of backpay were not suitable to the background of the 13 strikers. . . ." (139). The short answer to that is that the strikers had not so stated and the uncontradicted evidence was to the contrary.

working during a labor dispute and to take advantage of such insurance in comfortable idleness—the employer's right, to have them seek interim employment, to the contrary notwithstanding.

Surely more than a legal assumption is necessary to hold here that the idleness of these employees is not to be attributed to the obvious fact that they would *gain* by such idleness and *lose* by working. Such a holding could validly be made only upon the basis of substantial evidence to rebut that inference—evidence which is not in this record. The Board's failure to recognize this has resulted in an order which offers to strikers the prospect of collecting, through idleness, more than twice that which they would have earned at their jobs with the petitioner. When the payments ordered by the Board are added to what the employees have already received, that is precisely what has been held in this case.

The Board panel which considered the case expressed no disagreement with the petitioner's contentions that "... suitable jobs were available in the area as indicated by advertisements in [the petitioner's] newspapers" and that "the strikers failed to avail themselves of other employment during the liability period" (143). This defense was rejected with the assertion that:

> *"The Respondent failed, however, to show that the strikers did not seek these or other jobs.* We agree with the Trial Examiner, *therefore, that the Respondent has failed to meet its burden to establish facts which would negative the existence of liability to a given employee* or which would mitigate that liability" (143) (emphasis supplied).

It appears to the petitioner that this is merely a different way of stating the fallacy that circumstantial evidence is not to be regarded as proof by the Board in such cases, and that an employer can prove its defense only by *direct evidence* that job offers have been made *personally* to each given striker and have been rejected without justification. As to all of the other matters hereinabove referred to, the Board adopted the findings, conclusions and recommendations of the trial examiner without comment (142).

The Court panel below divided over the issues presented here. There was no disagreement among the judges over the analysis of the nature of strike benefits as such (Appendix, pp. 3a-8a, 15a-16a), and the ruling that these payments were "collateral." The petitioner is not now taking issue with that ruling. Like the Board, however, the panel majority refused to consider the important question of whether the Board had authority to rule as a matter of law that the strike payments did not induce employees to refrain from seeking interim work.[1]

In framing a second issue, the Court stated that the "Petitioner argues that Johnson's refusal to accept [the Rock Hill] job offer legally constituted a forfeiture of his right to

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[1]In analyzing the nature of the strike benefits, the majority stated that "the constitution and by-laws of the international union, not controverted by any other substantial evidence, established that a striker's first obligation was to seek interim earnings to reduce the drain on the strike benefit funds of the international union" (Appendix, pp. 3a-8a). With all due respect, this was patent error. The Board made no such finding — this proposition being mentioned for the first time in the Union's brief to the Court. The true issue was whether the employees sought interim employment and not whether their constitution said that they should have done so, and this Court has repeatedly admonished against courts of appeal engaging in factfinding. See, *e.g.*, *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L. ed. 1995 (1947).

backpay" (Appendix, p. 9a). This is not correct. What the petitioner actually argued as to that incident was that Johnson and the Union had no right to justify Johnson's refusal of that job *on the ground that acceptance of it would have interfered with his strike duties,* and the Board had no right to endorse that proposition. The Company has never contended that Johnson should have accepted that job in spite of the distance to Rock Hill. The factor of distance was totally insignificant since it was shown that Johnson was not available for interim employment under any circumstances —this being the crucial factor which the panel majority also failed to take into consideration. Both as to this evidence and as to the evidence that others were unavailable also, the point is that strikers cannot collect pay from their employer for the very strike activities which they are conducting against him.

> "Of course, participation in an unfair labor practice strike can affect the amount of back pay recoverable insofar as the strike hampered the efforts of discharged employees to mitigate their damages by seeking new employment."
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> *Bon Hennings Logging Company v. National Labor Relations Board,* 308 F. 2d 548, 558 (9 Cir. 1962)

> "Normally, the Board does not award back pay to employees discriminatorily discharged while on strike; agency theory is that, until it appears that employees who desire work have given up the strike, no determination can be made that their loss of pay was conclusively attributable to their employer's conduct."
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> *Sakrete of Northern California, Inc.,* 140 NLRB 765 (1963)

The panel only considered one other phase of the case—that is, the question of who has the burden of proof in situations of this kind. Here, again, the Court was in error, since no such question has been involved in the case. It is clear from the record that the petitioner had established *prima facie* a defense against any requirement that it must pay unmitigated back wages. Not only was that the gist of the petitioner's argument to the Court, it was expressly stated, and repeatedly so, that the Company had gone forward with the evidence and, in so doing, had produced proof which required rebuttal from the General Counsel to sustain any ruling against the petitioner's contentions (Company's brief, pp. 4, 6-9, 27; Company's reply brief, pp. 11-12). This was summarized with the statement that, "Since the evidence here affirmatively shows that strikers incurred losses willfully, the Company does not need to rely on the authority of [the *Mastro Plastics* and *Rice Lake Creamery*] cases to support its position" (Company's brief, p. 27).

In spite of this, the panel majority attributed such a defense to the petitioner, declaring that, "it asserts that the burden of such proof was on the Board's General Counsel, petitioner contends that the Board's order in this regard must be set aside" (Appendix, p. 11a). With all due despect, the petitioner has never made any such contention.

The panel majority proceeded to resolve this "issue" by rejecting the principles advanced by the courts in *National Labor Relations Board v. Mastro Plastics Corporation,* 354 F. 2d 170 (2 Cir. 1965) *cert. den.* 384 U.S. 972, 86 S. Ct. 1862, 16 L. ed. 2d 682 (1966) and *National Labor Relations Board v. Rice Lake Creamery Company,* 365 F. 2d 888 (D.C. Cir. 1966) and by adopting the rationale of the court in *National Labor Relations Board v. Mooney Aircraft, Inc.,* 366 F. 2d 809 (5 Cir. 1966) (Appendix, pp. 12a-15a).

The petitioner's position with respect to these rulings of the panel majority is succinctly summarized in the dissenting opinion filed in the Court below. After noting the evidence which had been introduced by the petitioner and the circumstances inherent in the case the dissenting Judge stated that:

"In the instant case there was evidence as shown above that strikers had registered with the South Carolina Unemployment Security Office but represented themselves as available for work only of the same type in which they had been engaged. The Union had fixed the unemployment benefits based on a higher wage scale than that prevailing in the Florence area. Without some explanation, it is not illogical to conclude that the higher wage scale was selected so that the strikers' benefits might be increased and thus provide a more nearly adequate allowance to meet living expenses during the strike. Some of the strikers permissibly worked one full eight-hour shift in certain work weeks to supplement their income but by so doing their strike benefits were not curtailed.

"The Examiner and the Board would require the company to show that no jobs were ever personally *offered* to any of the strikers or that offers of such jobs were ever *rejected* by any of the strikers. It is my impression that this goes far beyond what this court has ever required or sanctioned. It is my conclusion that the company made out a *prima facie* case by showing the circumstances of registration with the unemployment agency, availability of acceptable jobs in the area and the other facts and circumstances which provide strong support for the inference that the Union was offering every inducement to these strikers to accept no jobs and to refrain from seeking interim employment the earnings from which would miti-

gate their loss of wages. The company satisfied the only reasonable burden which should be imposed upon it under the circumstances by making a *prima facie* showing of lack of due diligence on the part of the reinstated strikers to minimize their losses of earnings during the liability period. It should then be the duty and burden of the General Counsel to show what unsuccessful efforts had been made by the strikers to secure interim employment, whether comparable to otherwise. There was nothing offered to rebut the *prima facie* case" (Appendix, pp. 20a-21a).

The holding in *National Labor Relations Board v. Mooney Aircraft, Inc.*, 366 F. 2d 809 (5 Cir. 1966), relied upon by the panel majority here, surely is no support for the proposition that the employees in this case should not have been required to offer some evidence in rebuttal of what was shown against them before they could collect full back wages. The liability period under consideration in the *Mastro Plastics* case was only from July 14 to July 18. Moreover, the company there offered no evidence of any kind. Accordingly, there is no factual similarity in these two cases. The only surprising feature on the *Mooney* decision is that the court felt it necessary to express its disagreement with the *Mastro Plastics* decision in order to sustain its ruling. It could not naturally have been expected in that case that employees would have found interim employment in mitigation of damages in the liability period of four or five days.

Precisely the reverse is here, where the liability period covered approximately one year. It is in such a situation that the courts in the *Mastro Plastics* and *Rice Lake Creamery* cases ruled that employees must be called as witnesses as a condition precedent to their collecting unmitigated back wages.

". . . [I]nformation relevant to whether the discriminatees willfully incurred a loss of earnings is within the knowledge of the discriminatees, not the employer. While the employer must raise this issue of mitigation of damages in its pleadings, *it does not follow that the employer should be required to come forward with evidence by producing the discriminatees. Since one purpose of the back pay remedy is to compensate them only for actual losses, it is logically within the duty of the Board to produce at the hearing the evidence most relevant to this question—testimony by the discriminatees.* Furthermore, while the Board correctly argues that its primary concern is the public interest in promoting full production and employment by means of the back pay remedy, it is nevertheless the representative of the discriminatees. *If the discriminatees had to sue in their own right for back pay, they would obviously have to testify and be cross-examined* (emphasis supplied).

. . . .

"Because the Board does customarily produce the discriminatees at back pay hearings, we conclude that a rule requiring a discriminatee to testify before his award becomes final is not an undue burden on the Board and would not undermine the efficacy of the back pay remedy."

National Labor Relations Board v. Mastro Plastics Corporation, 354 F. 2d 170, 177 (2 Cir. 1965), *cert. den.* 384 U.S. 972, 86 S. Ct. 1862, 16 L. ed. 2d 682 (1966)

"The Company also objects to the award to Malcolm Demers and Basil Colbert, because they failed to appear at the supplemental hearing where the back pay data was adduced. . . . We think the amount should be held in escrow until the discriminatee can be produced to testify, or some other method adopted to enable the Company

adequately to inquire of him about matters which might mitigate the amount, if any, due to him, failing in which within a reasonable time the award must be disallowed. In this ruling we follow the reasoning of the Court of Appeals for the Second Circuit in *NLRB v. Mastro Plastics Corporation, supra.*"

National Labor Relations Board v. Rice Lake Creamery Company, 365 F. 2d 888, 891-892 (D.C. Cir. 1966)

It seems obvious that the Courts of Appeal for the Second and District of Columbia Circuits *merely held that a long period of unexplained unemployment raises an inference that there has been no search for employment.* This is entirely consistent with prior Board and court precedents. See, *e.g., National Labor Relations Board v. Moss Planing Mill Co.,* 224 F. 2d 702 (4 Cir. 1955); *Missouri Transit Company, Inc.,* 125 NLRB 1316 (1959); and *Seampruf, Inc.,* 106 NLRB 1143 (1953). Surely application of that requirement is more reasonable and necessary here where, in addition to a long period of idleness, as the dissenting Judge noted, there was "evidence tending to show a glaring display of disinterest on the part of the strikers in securing temporary employment, a disinterest sanctioned and encouraged, if not actually prompted and directed, by the Union; also evidence tending to show the intent of the strikers to disregard their legal obligation to minimize their losses of earnings" (Appendix, p. 16a).

Upon the basis of all the foregoing, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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